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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 15, 1993

By Hand

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

EX PARTE

Re: In the Matter of the Petition of the Inmate
Calling Services Providers Task Force for
Declaratory Ruling; RM 8181

Dear Mr. Caton:

The Inmate Calling Services Providers Task Force ("ICSPTF") wishes to respond to the ex parte letters filed by NYNEX and Ameritech on October 4, 1993 and October 20, 1993 respectively. Both Ameritech and NYNEX express concern that the Commission would improperly preempt state authority should it grant ICSPTF's Petition because no evidence has been presented to indicate that state commissions are not properly regulating the provision of inmate calling services by local exchange carriers ("LECs").

The preemption concern of NYNEX and Ameritech is without foundation. ICSPTF seeks a ruling that inmate-only phones are customer premises equipment, and that certain of the specialized inmate-only services offered by the LECs are enhanced within the meaning of Computer II¹ and its progeny (collectively referred to as "CPE"). In Computer II, the Commission determined to remove CPE from regulation and preempted the states from regulating CPE. This determination has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit. See, Computer & Communications Industry Association v. FCC, 693 F.2d 198, 214-218 (1983). Simply

¹ Amendment of Section 64.702, 77 FCC 2d 384 (1980), recon., 84 FCC 2d 50, further recon., 88 FCC 2d 512 (1981), aff'd sub nom., Computer & Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983) ("Computer II").

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uncertainty there may be about this issue by clarifying in its order granting ICSPTF's Petition that there is no federal preemption of the inmate calling "services" that are not within the confines of its CPE determination. Indeed, ICSPTF recognizes the critical role of the state in the regulation of certain inmate calling services and believes that continued state regulation is crucial to the ongoing development of the industry. In this regard, the Commission's order can make clear that there is no preemption of state authority to regulate the rates for inmate calling services and/or set minimum operating requirements. The only issue in this proceeding is a declaration that the terminal equipment and related premises processors and adjuncts in the inmate calling systems are CPE.

Finally, ICSPTF wishes to address NYNEX's statement that "there is significant competition for inmate service." ICSPTF is in complete agreement with NYNEX on this point. As ICSPTF illustrated in an ex parte letter dated August 19, 1993, the competition in the inmate calling services market is vigorous and robust. ICSPTF does not agree with NYNEX, however, to the extent that it believes substantial competition in the inmate calling services market is a reason for the Commission not to declare that inmate calling systems are CPE. To the contrary, the fact that there is substantial competition in this market proves there is no valid reason why the LECs should continue to be allowed to cross-subsidize their inmate calling services under the protection of their regulated accounts. In short, the LECs should be forced to compete in this market on the same regulatory "playing field" as do their independent competitors.

Sincerely,



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Services Providers Task
Force

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put, the preemption issue that NYNEX and Ameritech have raised has already been considered and resolved by the Commission and the Court. To the extent that NYNEX and Ameritech intend to challenge the underlying policies of Computer II, they cannot do so in the instant forum. By arguing that state regulation is effectively regulating the CPE in question, and therefore, the states should not be preempted from regulating CPE, NYNEX and Ameritech are simply rearguing issues long resolved.

Moreover, to the extent that Ameritech suggests that the limited CPE exclusion recognized in Tonka creates an independent preemption concern, such a concern is not applicable here. As ICSPTF has previously explained, inmate calling systems are not within the confines of Tonka since inmate calling systems are *private systems*. The Commission's decision in Tonka pertained to LEC public payphones that are available to the "transient, mobile public." The only resemblance between the public payphones at issue in Tonka and the equipment at issue in ICSPTF's Petition is that the terminals in inmate calling systems often are, for purposes of durability, physically shaped like and look like public payphones. In fact, inmate calling systems operate in a manner similar to a private branch exchange ("PBX"), and have all the attributes and control functionality of a private telephone system.² Moreover, inmate calling systems are clearly not available to the "transient, mobile public," as Tonka would require.³

In any event, the Commission can easily alleviate any

² In this regard, we note that NYNEX is simply wrong in stating that "inmate-only phones are not materially different from other public phones."

³ Ameritech's attempt to extend the logic of Tonka to include inmate calling systems within the CPE exclusion because "the inmates themselves cannot separately select, combine or pay for the terminal devices and transmission line which are used to make the call," proves to much. As ICSPTF has previously explained, under the "integration of phone and service" logic, the inmate calling systems provided by non-LEC ICS providers could not be CPE because the inmates using those systems similarly cannot "separately select, combine or pay for the terminal devices and transmission line which are used to make the call." Of course, there is no dispute that the non-LEC ICS provider equipment is CPE, and is not subject to state regulation. Thus, Ameritech's logic must fail.